calculation called for by the verb 'emit' [to] lose all significance").

The Fourth Circuit's "modification" test would ignore that clear intent by focusing on whether a change increases a source's maximum "hourly emissions rate" – which is a measure of whether a change would increase a source's emissions *capacity*, not of whether the change would cause actual emissions to increase. Specifically, the Fourth Circuit's maximum hourly test unlawfully ignores large actual emission increases from increased hours of operation made possible by a plant renovation. Indeed, increased hours of operation could cause a source's overall emissions to increase dramatically without increasing its hourly emissions rate. Congress expressly sought to avoid such an outcome by framing the CAA in terms of "amount[s] . . . emitted," 42 U.S.C. § 7411(a).

A straightforward analysis of the CAA's language demonstrates the difference between regulating amounts of emissions and regulating emissions rates. As defined by the *Merriam-Webster's Collegiate Dictionary*, "amount" is the "total number or quantity," and "emit" is "to throw or give off or out." *Merriam-Webster's Collegiate Dictionary* 39, 378 (10th ed. 1998). A program that regulates stationary sources by their hourly emissions rates alone would fail to regulate changes that cause a stationary source to "give off" increased quantities of pollutants. In sharp contrast, a program that regulates statutory sources by amounts of emissions, as does the actual annual emissions increase test in EPA's 1980 PSD regulations, would evaluate the actual quantity of pollutants given off by the stationary sources. *Cf. Alabama Power*, 636 F.2d at 353.

Unlike the Fourth Circuit's hourly emission rate test, the annual emissions increase test required under EPA's PSD regulations gives force to Congress's intent to regulate those changes that cause actual emission increases.[3] Accordingly, the Fourth Circuit's refusal to apply the regulatory annual emissions test – and its insistence that EPA must instead utilize a capacity-based hourly emissions rate test – should be rejected by the Court.

B. The Structure of the PSD Compliance Requirements Further Demonstrates Congress's Intent to Regulate Actual Emissions Increases.

Moreover, for the sake of the purpose of the PSD New Source Review (NSR),[4] Section 111(a)(4) must be held to require compliance for those changes to a stationary source that increase actual emissions. Under Section 165(a) of the Act, Congress set forth specific compliance procedures for "major emitting facilit[ies] constructed in any area to which this part applies. . . ." 42 U.S.C. § 7475(a). Section 165 requires that a facility seeking to undergo construction must obtain from EPA a permit "setting forth emissions limitations for such facility which

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[3] *See* 45 Fed. Reg. 52,675, 52,701 (seeking "as close a correspondence as possible" between the regulatory coverage of new and modified sources and their actual impacts on air quality and available PSD increment).

[4] The PSD program, along with the Nonattainment New Source Review (NNSR) program, collectively make up a broader program referred to as the New Source Review (NSR). While the NNSR program pertains to regions that fail to satisfy their National Ambient Air Quality Standards (NAAQS), 42 U.S.C. §§ 7505-7515, the PSD program pertains primarily to regions where the air quality levels satisfy the NAAQS.

conform to the requirements of this part." *Id.* § 7475(a)(1). In turn, Section 169(2)(C) of the PSD provisions states that the "term 'construction' when used in connection with any source or facility, includes the modification (as defined in Section 111(a)) of any source or facility." 42 U.S.C. § 7479(2)(C) (emphasis added). Section 165 also requires the owner or operator of such a facility to demonstrate

> that *emissions* from construction or operation of such facility will not *cause*, or contribute to, air pollution excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

Id. § 7475(a)(3).

Again, a plain language analysis demonstrates that Congress intended to allow the PSD program to regulate the actual emitted amount of air pollution resulting from a construction, rather than limit regulation to the hourly emissions rate desired by the industry respondents. As defined by the *Merriam-Webster's Collegiate Dictionary*, "emissions" is the "act of" "throw[ing] or giv[ing] off or out." *Merriam-Webster's Collegiate Dictionary* 378 (10th ed. 1998). "Cause," in turn, is defined as "to serve as a cause or occasion of," *id.* at 182, and "contribute" is defined as "to give or supply in common with others," *id.* at 252. Accordingly, a program that regulates statutory sources based on emissions caused by facility construction, as do EPA's 1980 PSD regulations, must be able to evaluate whether the proposed modification would give off or

supply excess actual pollutants in violation of 42 U.S.C. § 7503(a)(3).

In contrast, a program that is limited to regulating stationary source modifications solely by their hourly emissions rates, without also allowing regulation of actual emissions, would fail to control modifications from giving off increased quantities of pollutants. The PSD provisions account for emissions rates, but not without regard to other factors. For example, a proposed modification could operate for an increased number of hours each day in a manner that it could not absent the construction, thereby increasing its overall emissions under this regime without increasing its emissions rate. But Section 165 expressly seeks to avoid such loopholes by addressing "emissions" that would "cause, or contribute to," excess air pollution in violation of the PSD provisions, 42 U.S.C. § 7503(a)(3). Any attempt to restrict the PSD program from regulating actual increased quantities of pollutants should be rejected as contrary to the language of the CAA.

C. The Overall Structure of the Statute Also Emphasizes the Critical Role Of Actual Emissions in the New Source Review Process.

The emphasis that the statutory language places on actual emissions, as opposed to a source's emissions capacity (i.e., its maximum hourly emissions rate), is crucial to the larger context and purpose of the CAA's New Source Review (NSR) provisions, of which the PSD requirements are one part. Congress intended these NSR provisions to guard against increases that threaten to worsen ambient air quality. Indeed, Section 165 must be read in the context of other statutory provisions and the

purpose of the NSR program. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 545-46 (2002) ("[I]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (citation and internal quotations omitted); *see also Gen'l Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (applying "the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it") (internal quotations, brackets, and citation omitted); *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50, 60 (2004) (stating that statutes are to be read in a "holistic" manner); *Chao v. Mallard Bay Drilling*, 534 U.S. 235, 245 n.9 (2002) (holding an interpretation that would leave "large gaps in the regulation of occupational health and safety" would be "plainly inconsistent with the purpose of the [Occupational Safety and Health] Act").

In addition to the plain language of CAA § 111(a)(4), as well as CAA § 165, numerous other statutory provisions demonstrate Congress's intent that the PSD program regulate any physical change that causes a facility to increase its actual emissions air pollution, regardless of whether the change also increases the facility's hourly emissions rates. *See* 42 U.S.C. §§ 7479(1), 7475(b), 751[illegible](c)(6). These provisions all address changes in terms of either actual amounts per year or total emissions, rather than the hourly emission rates measured by the Fourth Circuit's required test. For example, the CAA requires NSR under its PSD provisions prior to construction of any new source that emits, or has the potential to emit, more than the "tons per year" threshold applicable to that source category. *See* 42 U.S.C. § 7479(1). Specifically, the statute establishes a 100 ton per year threshold for

certain specified sources (including "fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input"), and a 250 ton per year threshold for all other sources. *Id.* In contrast, the respondents' hourly rates would authorize sources to proceed without review even when making changes that cause annual emission increases many times the amount that would have triggered NSR if the source were being built from scratch. Such an absurd result plainly contravenes Congress's intent.

Likewise, the statute exempts certain modifications from NSR's required air quality analysis under limited circumstances that include where a source limits its post-modification burden on air quality to "less than *fifty tons per year*" (emphasis added), 42 U.S.C. § 7475(b). Again, this statutory approach plainly demonstrates that Congress did not intend for EPA to utilize hourly emissions rates as a trigger for PSD.

The 1990 CAA amendments further emphasize Congress's long-standing understanding of NSR applicability as turning on whether a change will increase a source's actual annual emissions. For example, Section 182(c)(6), added to the Act in 1990, specifies a special de minimis rule for sources that emit volatile organic compounds, and couched that rule in terms of *tons per year increases*. Specifically, this new statutory provision states:

> The new source review provisions under this part shall ensure that increased emissions of volatile organic compounds resulting from any physical change in, or change in the method of operation of, a stationary source located in the [serious nonattainment] area shall not be considered de

> minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

42 U.S.C. § 7511a(c)(6). Immediately following that provision, another provision creates a "special rule for modifications of sources emitting less than 100 tons," which applies whenever such a source makes a change "except for a de minimis increase" as established in Section 182(c)(6). *See* 42 U.S.C. § 7511a(c)(4)(C)(7). Thus, the applicability of this provision depends on whether a change would lead to more than a de minimis increase, which Section 182(c)(6) defines in terms of the annual tonnage increase resulting from a planned change. *See* 42 U.S.C. § 7511a(c)(4)(C)(6). The same is true for Section 182(c)(8), which establishes a "special rule for modifications of sources emitting 100 tons or more." *See* 42 U.S.C. § 7511a(c)(4)(C)(8). These provisions are part of the statutory context and thus are relevant to interpretation of congressional intent, and confirm that the CAA focuses the NSR on annual actual emissions, not a source's hourly emissions rate.

II. The Purpose of the PSD Amendments Would Be Frustrated If the Act Is Interpreted to Limit PSD Review to Those Changes that Increase a Facility's Hourly Emissions Rate.

Congress's declaration of purposes for the PSD program – included in the statute itself – state that the program was designed "to protect public health and

welfare from any *actual or potential adverse effect* which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution. . . ." *See* 42 U.S.C. § 7470(1) (emphasis added). It also states that the program is intended to "assure that *any decision to permit increased air pollution* in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." *See* 42 U.S.C. § 7470(5) (emphasis added).

These statutory goals, which speak in terms of controlling "actual" air pollution, and "increases" in the same, are inconsistent with an hourly rate test that would ignore actual emission increases that threaten public health and the environment and degrade air quality.

Furthermore, the 1977 legislative history makes it clear that Congress did not intend to permit aging sources, whatever their hourly emissions rate, to take up all the allowable amounts of pollution available to clean air areas, limiting the ability to develop new industrial plants. As the Senate explained in 1977, "[t]he chief tool to be used in implementing the no significant deterioration requirements is the permit that must be issued by the State for any major emitting facility to be located in any clean-air area, including Federal lands." S. Rep. No. 95-127, at 32 (1977). *See also* H.R. Rep. No. 95-294, at 9 (1977) ("The purpose of the [PSD] permit is to assure that the allowable increments and allowable ceilings will not be exceeded as a result of emissions from any new or modified major stationary source."). Use of the legislative history to discern Congressional intent is particularly appropriate in the case of the complex Clean Air Act, as this Court has

recognized. It has looked to the legislative history to determine Congressional intent under the Act in, by our count, in fourteen of the twenty most recent cases in which the Court has interpreted the Act. *See, e.g., Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 723 (1987) (considering factors endorsed by Congress); *Chevron*, 467 U.S. at 851 (looking to the legislative history to determine Congressional intent); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (using legislative history to establish Congress's designation of discretionary authority); *Harrison v. PPG Indus.*, 446 U.S. 578, 589-590 (1980) (declining to adopt a statutory interpretation based on a lack of support in the legislative history); *see generally League of United Latin American Citizens v. Perry* ___ S.Ct. ___, 2006 WL 1749637 (June 28, 2006) (Kennedy, J.) (turning to "the legislative history [of the Voting Rights Act] identifies factors that courts can use . . . in interpreting" the meaning of a section of the statute).[5]

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[5] The D.C. Circuit has acted similarly. Between 1995 and the present, the D.C. Circuit has turned to the legislative history to understand Congressional intent in ten out of fourteen cases (71.4%) involving Clean Air Act rulemaking. *See New York*, 443 F.3d at 885 (finding that legislative history did not support an expansive meaning of the word "any"); *Ctr. for Energy & Econ. Dev. v. Envtl. Prot. Agency*, 398 F.3d 653, 660 (D.C. Cir. 2005) (finding that all the legislative history references pertain to § 169A and Congress's addition of § 169B clarified that the focus of the Clean Air Act was to achieve "actual progress and improvement in visibility."); *Nat'l Wildlife Fed'n v. Browner*, 237 F.3d 670, 675 (D.C. Cir. 2001) (finding that the legislative history suggested that Clean Air Act § 509(b)(1) was a venue provision, not jurisdiction provision); *George E. Warren Corp. v. U.S. Envt'l. Prot. Agency*, 159 F.3d 616, 623 (D.C. Cir. 1998) (using the congressional record to establish that the Clean Air Act "reflects a legislative compromise between two potentially conflicting goals – avoiding degradation of air quality and not disrupting the market for conventional gasoline."); *Clean Air Implementation Project v. Envt'l. Prot. Agency*,

(Continued on following page)

The legislative history further demonstrates that Congress intended for the PSD program to promote economic growth by ensuring that existing sources, if modified, would not consume all available PSD increment, thereby preventing new sources from constructing in an area. As the Senate explained:

> In the long run, the growth potential of these clean-air areas may be quickly filled without a reasonable policy to prevent significant deterioration. The first new source built in an area would often absorb the entire available air resource, leaving no capacity for future expansion or growth. Under the policy to prevent significant deterioration in this bill, the growth options should be enlarged. This is because the provision requires that any major source be constructed to utilize the best available control technology. This should usually leave room for additional growth.

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150 F.3d 1200, 1202 (D.C. Cir. 1998) ("Section 113 deals with federal enforcement of emission standards and, according to its legislative history, was amended to enhance EPA's enforcement powers."); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998) (finding that the House Report shows that Congress intended to give California the broadest possible discretion to select the best means to protect its citizens); *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) (noting House Report No. 294 described Clean Air Act § 307(b)(1) as a venue provision); *EDF, Inc. v. EPA*, 82 F.3d 451, 463 (D.C. Cir. 1996) (looking to see if the legislative history of the statute could provide guidance on general conformity rule, on finding it didn't, turning to the language of the statute) *Nat'l Res. Def. Council v. Browner*, 57 F.3d 1122, 1128 n.8 (D.C. Cir. 1995) (finding the legislative history contrary to the NRDC statutory interpretation.).

S. Rep. No. 95-127, at 31 (1977). The Senate Committee explained that it should be up to the community where a source proposed to construct to decide whether to allow the source to increase emissions such that increment is consumed. Specifically, the Senate Report states:

> This directive enables the State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as anticipated and desired economic growth for the area. This allows the States and local communities to judge how much of the defined increment of significant deterioration will be devoted to any major emitting facility. If, under the design which a major facility proposes, the percentage of the increment would effectively prevent growth after the proposed major facility was completed, the State or community could refuse to permit construction, or limit its size. This is strictly a State or local decision: this legislation provides the parameters for that decision.

S. Rep. No. 95-127, at 31 (1977).

But under the Fourth Circuit's rule, these sorts of determinations by the states would be impossible in jurisdictions where emissions-increasing changes to old sources proceed without NSR review, thus using up all the states' available increment, and preventing new, economically desirable and environmentally efficient sources from coming on line. Congress plainly did not intend such an outcome.

Related statutory provisions detailing what a source must demonstrate as a prerequisite to obtaining a PSD permit further emphasize the ambient air quality focus of the NSR program.

For example, the statute elsewhere requires permit applicants to measure their air pollution from their source *on an annual basis*. It requires the owner or operator of a proposed new source or modification to demonstrate that emissions will not "cause, or contribute to" a significant increase in air pollution beyond the "baseline concentration of such pollutants." *See* 42 U.S.C. § 7474(a)(2)(B). "Baseline concentration" is defined as "the *ambient concentration levels* which exist at the time of the first application for a permit in an area subject to this part." 42 U.S.C. § 7479(4) (emphasis added).

The statute further provides that issuance of a permit "shall be preceded by an analysis . . . *of the ambient air quality* at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility." 42 U.S.C. § 7475(e)(1) (emphasis added). That analysis "shall *include continuous air quality monitoring data* gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part." 42 U.S.C. § 7475(e)(2) (emphasis added). The Act specifies that the monitoring data should be "gathered over a period *of one calendar year preceding the date of application for a permit.*" *Id.* (emphasis added).

III. The Respondents' Reading of "Modification" Would Frustrate the Policies of the Clean Air Act.

A. The Actual Annual Emissions Test in EPA's PSD Regulations is Needed to Effectuate the Objective of the PSD Program.

Regulation of those changes that cause a stationary source to increase its actual annual emissions, rather than only those changes that increase hourly emissions rates, is necessary to accomplish the objectives of the PSD program set forth by Congress. Statutes should not be interpreted in ways that would thwart their objectives. *See U.S. Airways v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting a reading under which statutory provision "could not accomplish its intended objective"); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003) (rejecting an interpretation that would "thwart the statute's object"); *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003) (rejecting a reading that was "out of line with one of the statute's principal purposes"). Congress focused Section 111(a) on whether a modification would cause increases in the amount of air pollution emitted by a source and Section 165 on whether new construction on a major emitting facility would lead the facility to cause, or contribute to excess air pollution. 42 U.S.C. §§ 7411(a), 7503(a)(3). Moreover, Congress created the PSD program to prevent such increases from significantly deteriorating air quality. *See* 42 U.S.C. § 7470 (listing five statutory purposes of the PSD program, each of which includes air quality, *see infra* Section III.B.). But under the Fourth Circuit's test, a source could greatly increase its actual emissions of harmful air pollutants through construction that would allow increased hours of operation, so long as that

construction does not change the emitting unit's capacity to emit.

These Congressional objectives for the PSD program cannot be accomplished through the hourly emissions rate test desired by the industry respondents. As lower courts faced with applying the PSD provisions have noted, the PSD program "focuses on where the plant will be located and its potential effect on the environs," *Citizens for Clean Air v. Envt'l. Prot. Agency*, 959 F.3d 839, 849 (9th Cir. 1992). Indeed, the PSD program demands a site-specific review of whether a proposed major source will contribute to a significant degradation of local air quality despite compliance with the NSPS. *See* 42 U.S.C. § 7470(1). Accordingly, the PSD program addresses changes to stationary sources in terms of actual amounts rather than hourly rates in order to prohibit changes to stationary sources that will lead to larger potential effect on the environs, through increased rates, longer hours of operations, or any other changes that may contribute to a significant degradation of local air quality.

B. The Purpose of the Nonattainment New Source Review Provisions of the Statute Would Also Be Thwarted If the Act Was Interpreted to Permit Measurement of Pollution Through an Hourly, Instead of Actual Annual Emissions Rates.

In addition to being inconsistent with the PSD program, the hourly test embraced by the Fourth Circuit is inconsistent with the statute's nonattainment new source

review provisions.[6] The nonattainment portions of the Act depend upon the ability of states to adopt pollution control strategies that focus on annual emissions. The hourly emissions rate test adopted by the Fourth Circuit threatens to crowd these actual-emissions-based state plans out, upsetting the balance in the federal-state relationship that is crucial to the operation of the Act.

The Act requires each State to include a nonattainment New Source Review permit program in its plan to implement the NAAQS. *See* 42 U.S.C. § 7410(a)(C) (plans must include "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program" including permitting requirements for sources in nonattainment areas).

The adoption of these "State Implementation Plans" requires the establishment of attainment inventories, with enforceable plans approved to meet those inventories. Attainment inventories catalogue criteria pollutants in terms of actual emissions in tons per year. *See* 42 U.S.C. §§ 7502(c)(3)-(4) (SIPs must include a "comprehensive, accurate, current inventory of actual emissions from all sources"). Reliance on hourly capacity-based tests would allow significant increases in actual, annual emissions to escape NSR controls. As states have noted, these increases under a potentials-based test will disrupt their attainment and maintenance effort.

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[6] Those provisions are applicable to areas that are violating the National Ambient Air Quality Standards (NAAQS).

The balance between state and federal control struck in the Act is an important one, and one that Congress carefully struck in the 1977 Amendments. *See* Ronald H. Rosenberg, *Cooperative Failure: An Analysis Of Intergovernmental Relationships And The Problem Of Air Quality Non-Attainment*, 1990 Ann. Surv. Am. L. 13, 25 (describing the 1977 Amendments as consistent with a "general pattern of state planning and federal supervision"). The Act is founded on principles of cooperative federalism, and the Fourth Circuit's rule would upset that balance. *See Duke Energy Corp.*, 411 F.3d at 550 (finding that the EPA must interpret the term "modification" congruently for use in the NSPS and PSD programs); *see also Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("[I]t is not our role to alter the delicate balance Congress has labored to achieve.").

Other aspects of the part of the Act designed to apply to especially polluted states make clear that the 1977 Amendments were designed to curtail, rather than ignore, those emission increases that could negatively impact ambient air quality. Specifically, in addition to controlling emissions to the "lowest achievable emissions rate," 42 U.S.C. § 7503(a)(2), the permit applicant must, among other things:

- obtain "sufficient offsetting emissions reductions . . . such that total allowable emissions from existing sources in the region . . . will be sufficiently less than total emissions from existing sources . . . prior to the application for such permit . . . so as to represent . . . reasonable further progress" in attaining NAAQS compliance. 42 U.S.C. § 7503(a)(1)(A). Such offsets "shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the

same or other sources in the area." 42 U.S.C. § 7503(c)(1); and

- undertake "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source [that] demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." 42 U.S.C. § 7503(a)(5).

The nonattainment NSR provisions in these ways turn on actual emissions, instead of hourly rates. But the Fourth Circuit's rule would make hourly rates the currency in NSR. Such a conclusion is impossible to square with the way the nonattainment NSR portions of the statute address emissions – on an actual, annual basis.

C. The Fourth Circuit's Rule Would Lengthen the Lives of Old, High-Pollution Sources Contrary to Congress's Intent.

The use of the hourly rate would encourage the continued use of outdated, older, "grandfathered" facilities operating with little or no air pollution control well into the future. As the Act's legislative history demonstrates, however, Congress's decision to allow these sources to continue operating without NSR controls was based on the expectation that many "older units fac[e] retirement in 10-15 years," meaning that they would have to be refurbished – and controlled – if they were to continue operating. *See* H.R. Rep. No. 94-1175, at 159 (1976). In recognition of this congressional intent, *Alabama Power* held that "[t]he statutory scheme intends to 'grandfather' existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all

standards under the PSD program." 636 F.2d at 400; *see also New York I*, 413 F.3d at 27 (same).

Perpetual immunity – the practical consequence of the Fourth Circuit's rule – is the opposite of what Congress intended. For example, while the 1977 House report acknowledged that for "some of the older and smaller sources, it is not physically or economically feasible to retrofit" pollution controls, it also noted that those sources were exactly the sort of sources with limited useful lives and short futures. *See, e.g.*, H.R. Rep. No. 94-1175, at 159 (1976) ("[I]t is imprudent to backfit FGD [a control technology] into existing plants, especially older units facing retirement within 10-15 years.") *See also* S. Rep. No. 95-127, at 128 (1977) ("There are in the United States approximately 200 old coal-fired power plants over 20 years of age. . . . Most will be totally phased out of operation in the next 5 to 20 years.") (additional views of Sen. Baker).

A perpetual immunity for old, high-emitting plants, is unlikely to result in cleaner air. Indeed, permitting older plants to be run harder and longer at the same generous hourly emissions rates that they have been operating under since the advent of the Act would circumvent its purpose. Per megawatt hour (MWh) of electricity produced, coal-fired plants built before 1950 emitted an average of 20.58 pounds of sulfur dioxide per MWh of electricity produced, while coal-fired power plants built after 1999 emitted only 3.88 pounds.[7] The average nitrogen oxide emission rate for pre-1950 plants was 5.51

[7] National Research Council, Interim Report of the Committee on Changes in New Source Review Programs for Statutory Sources of Air Pollutants, tbl. 3-3(b) (Nat'l Academies Press 2005), available at www.nap.edu/books/0309095786/html.

pounds per MWh, while for post-1990 plants the rate was 3.51.[8] Permitting these plants to operate forever at their high emission rates retards capital turnover; 57% of all power plants in the United States were built before 1972, while 35% are more than 50 years old.[9]

Congress considered and rejected expanding the scope of grandfathering in the 1990 Amendments to the Clean Air Act. During the debate on what kind of emissions controls to impose on older plants, Senator Chafee, the Ranking Member of the Senate Environmental and Public Works Committee and floor manager for the 1990 CAA revisions, observed: "The rationale that is behind permitting these old plants to emit is first of all, they are inefficient, and at some point they are so inefficient they are going to be replaced. And there you come in with a new plant and a clean plant." 136 Cong. Rec. S. 3717, 3726 (1990), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 6946, 6970 (1993) (statement of Sen. Chaffee, Senate Debate on S. 1630). "A [floor] statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).[10]

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[8] *Id.* at 81, tbl. 3-3a. Accordingly, "a bias towards older capital is a bias against better pollution control equipment and a perpetuation of pollution externalities." Shi-Ling Hsu, *The Real Problem with New Source Review*, 26 Envtl. L. Rep. 10098 (2006).

[9] U.S. General Accounting Office, Emissions From Older Electricity Generating Units 2 (2002).

[10] *See also American Trucking Ass'n, Inc. v. ICC*, 697 F.2d 1146, 1149 (D.C. Cir. 1983) (Scalia, J.) (relying on floor statements as part of the relevant legislative history of a statute); *Southeast Shipyard Ass'n v. United States*, 979 F.2d 1541, 1546 (D.C. Cir. 1992). Sponsor statements

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However, "[t]he flaw," Chafee explained, is that "we are not seeing the end of these plants. We are not seeing them go either out or to be reused in a very reduced fashion." *Id.* Congress accordingly rejected attempts to relax the new source review process; now the Fourth Circuit has done what Congress eschewed in 1990.

In fact, several Senators wrote to Conference Committee Chair Senator Baucus specifically urging the adoption of a rule that would "[a]llow utilities to undertake needed repairs at an existing unit without triggering an obligation to meet stringent new source performance standards." 136 Cong. Rec. S. 17429, 17429 (1990), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 731, 1087 (1993). The Conference Agreement version of S. 1630, however, omitted such a change. Senator Mitchell, speaking during the Conference Report floor debate, explained why:

> In 1970, the Clean Air Act required that new sources meet tight emission standards. At that time, it was assumed that electric utility units had an average lifetime of 30 years. But many utilities are now choosing to extend the life of their plants rather than meet the new source

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"greatly aid in making the [statute's] purpose apparent." Max Radin, *A Short Way With Statutes*, 56 Harv. L. Rev. 388, 411 (1942); *see also Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 179 (1989) (giving weight to Senator Yarborough's views on the construction of the Age Discrimination in Employment Act because he was a sponsor). *See also Pacific Gas & Elec. Co. v. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 n.23 (1983) (relying on a 1965 explanation by "an important figure in the drafting of the 1954 [Atomic Energy] Act"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998) (sponsors' statements); *Conroy v. Aniskoff*, 507 U.S. 511, 516-7 & n.12 (1993) (sponsors' statements).

> performance standards mandated under current law. This development has exacerbated our pollution problems and made national acid rain controls even more necessary. Some approaches . . . would again shield utilities from meeting new source standards – and postponing needed emission reductions – even though such utilities may in essence be rebuilding their units.

136 Cong. Rec. S. 16895, 16904 (1990), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 731, 791 (1993).

The 1990 debate provides more evidence that Congress knew that the older plants would provide more than their share of pollution for the remainder of their lives. However, Congress clearly expected that the end of those lives would not be far away. Permitting plants to enjoy the benefit of old-plant emissions standards with entirely new plant equipment would not be consistent with Congress's intent in establishing the PSD and nonattainment NSR programs.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fourth Circuit's decision.

Respectfully submitted,

DAVID ZARING
WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
Lewis Hall
Lexington, Virginia 24450
(540) 458-8301

STEPHANIE TAI
(*Counsel of Record*)
THE UNIVERSITY OF WISCONSIN
LAW SCHOOL OF LAW
975 Bascom Mall
Madison, Wisconsin 53706
(608) 890-1236